

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT NEW YORK

SWORDPEN.COM, INC.,

Plaintiff,

- against -

HENRY HOLT AND COMPANY, LLC,
KAREN J. KATZ, and JOHN and/or JANE
DOES 1-10,

Defendants.

07 Civ. 10955 (KMK)

AFFIDAVIT OF ROBERT D. BALIN

[illegible]

ROBERT D. BALIN, being duly sworn, deposes and says:

1. I am a member of Davis Wright Tremaine LLP, attorneys for defendants Henry Holt and Company, LLC (“Holt”) and Karen J. Katz (“Katz”) in the above-captioned action. I submit this affidavit in support of defendants’ motion to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6) or, in the alternative, for summary judgment in defendants’ favor pursuant to Rule 56.

2. This affidavit is submitted for the limited purpose of annexing pleadings and documents relevant to defendants' motion.

3. Annexed as Exhibit A is a copy of the Complaint filed by plaintiff SwordPen.com, Inc. (“SwordPen”) in this action. In the Complaint, SwordPen – as the copyright assignee of Zev Lewinson (“Lewinson”) – alleges that a children’s book written by Katz and published by Holt in 2006, entitled *Can You Say Peace?* (the “Katz Book”), infringes the copyright in an unpublished manuscript, entitled *What Do You Call It?*, which Lewinson

registered with the Copyright Office on December 2, 1999 (the "Manuscript").

4. Annexed as Exhibit B is a true and correct copy of the Katz Book.

5. Annexed as Exhibit C is a true and correct copy of the Manuscript, certified by the United States Copyright Office, that Lewinson registered with the Copyright Office on December 2, 1999 under Registration No. Txu 928-388.

6. Annexed as Exhibit D is a copy of a pre-motion letter brief, dated February 14, 2008, from plaintiff's counsel to the Court and the exhibits attached thereto. In his pre-motion letter brief, plaintiff's counsel attached as Exhibit C thereto a greatly enlarged and unregistered version of the Manuscript that contains material not contained in the registered Manuscript.

7. In or about 1995, DK Publishing, Inc., in association with the United Nations Children's Fund, published a children's book, written by Barnabas & Anabel Kindersley, entitled *Children Just Like Me*. A true and correct copy of that work is annexed hereto as Exhibit E.

8. In or about 1995, Tambourine Books, in association with the United Nations, published a children's book, written and illustrated by various authors, entitled *My Wish For Tomorrow*. A true and correct copy of that work is annexed hereto as Exhibit F.

9. In or about 1999, Henry Holt and Company, in association with Oxfam, published a children's book, written by Beatrice Hollyer, entitled *Wake Up, World!* A true and correct copy of that work is annexed hereto as Exhibit G.

10. In or about 1999, Houghton Mifflin Company published a children's book written by Lezlie Evans and illustrated by Denis Roche, entitled *Can You Count Ten Toes?: Count to 10 in 10 Different Languages*. A true and correct copy of that work is annexed hereto as Exhibit H.

11. In or about 2001, Kids Can Press published a children's book, written by Donata Montanari and translated from the original Italian, entitled *Children Around The World*. A true

and correct copy of that work is annexed hereto as Exhibit I.

12. In or about 2004, Little, Brown and Company published a children's book, written and illustrated by Todd Parr, entitled *The Peace Book*. A true and correct copy of that work is annexed hereto as Exhibit J.

13. In or about 2004, Atheneum Books for Young Readers published a children's book, written and illustrated by Vladimir Radunsky, entitled *What Does Peace Feel Like?* A true and correct copy of that work is annexed hereto as Exhibit K.

14. In or about 2005, Holiday House, Inc. published a children's book written by Sam Williams and illustrated by Mique Moriuchi, entitled *Talk Peace*. A true and correct copy of that work is annexed hereto as Exhibit L.

15. In or about 2006, Houghton Mifflin Company published a children's book written by Lezlie Evans and illustrated by Denis Roche, entitled *Can You Greet the Whole Wide World?: 12 Common Phrases in 12 Different Languages*. A true and correct copy of that work is annexed hereto as Exhibit M.

16. The Dustflap of the Katz Book notes that Katz is the author and illustrator of more than twenty books for children, including a work entitled *The Colors of Us*. A true and correct copy of the work entitled *The Colors of Us*, published in 1999 by Henry Holt and Company, is annexed hereto as Exhibit N.

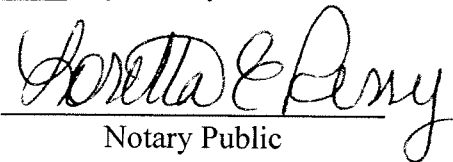
17. On April 11 and May 5, 2008, my associate Christopher Robinson conducted several searches on Google Images database using combinations of the search terms *child, children, kids, nation, world, globe, peace and dove*. From the search results pages, he accessed numerous websites and copied certain images from them. True and correct copies of representative images, showing children grouped around or standing on a map or image of the

world, are annexed hereto as Exhibit O. Representative images, showing children and a dove with an image of the world, are annexed hereto as Exhibit P. Representative images, showing a dove with the image of the world, are annexed hereto as Exhibit Q.



Robert D. Balin

Sworn to before me this
5th day of May, 2008


Notary Public

LORETTA E. PERRY
NOTARY PUBLIC, State of New York
No. 24-4931617
Qualified in Kings County
Commission Expires August 1, 2010